

A **MIRZA MOHAMED TARIQ BEG MIRZA HH BEG**

v.

PERUNDING PAKARMEDIA SDN BHD

B HIGH COURT MALAYA, KUALA LUMPUR
NALLINI PATHMANATHAN JC
[ORIGINATING SUMMONS NO: D-24-32-09]
24 APRIL 2009

C ***COMPANY LAW: Accounts - Inspection, application for - Rights of inspection as a director - Whether plaintiff as director entitled to inspect accounts - Whether order sought to cause detriment to company - Whether director acting in breach of fiduciary duties - Whether requirements of s. 167(6) Companies Act 1965 complied with***

D The plaintiff ('Mirza') was a director and 35% shareholder of the defendant ('the company'). By this originating summons, Mirza applied to inspect the accounts of the company under s. 167(6) of the Companies Act 1965. The precise prayers sought in Mirza's application were that the 'accounting and other records' of the company be made available for inspection and examination. The company strenuously opposed this application. In his affidavit in support of the application, Mirza explained that the purpose of the application was that he wished to ascertain the veracity and quantum of the debt owed by the company to Carat Media Services Sdn Bhd ('Carat'). The company disputed this application on the grounds that: (i) Mirza had acted in breach of his fiduciary duty as a director in that it was alleged that two cheques to Carat that were meant for the payment of a prior debt were utilised or authorised by Mirza to be used by Carat for 'booking' purposes, in other words for a future obligation rather than for a previously incurred debt; (ii) if this order was granted, Mirza would utilize the information thus procured to commence further proceedings, which would be to the detriment of the company; (iii) documents had in fact been made available to Mirza, and therefore, there was no basis for this repeated request.

H **Held (granting an order in terms of prayers (i) and (ii) of encl. 1):**

I (1) Mirza as a director was entitled to inspect the accounting and other records of the company and concomitant with that, under s. 167(6) should be allowed to appoint an independent auditor to analyse the accounts on his behalf on condition that confidentiality of the records of the company was preserved.

Mirza would of course lose that right if it could be shown that he was seeking this order to cause detriment to the company or was acting in breach of his fiduciary duties. (para 7)

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- (2) The company relied on the alleged fact that two cheques prepared by persons other than Mirza and signed by signatories other than Mirza were originally meant to be issued to Carat towards reduction of a prior debt owed to Carat. However, it was contended that Mirza had altered the purpose of the payment such that it was to be utilised by Carat towards payment of a 'booking fee' rather than payment of the debt owed by the company to Carat. An objective analysis of the foregoing did not show that Mirza acted in breach of his fiduciary duties. He in no manner profited from these payments. The payments were made to the same original payee, Carat. The monies were used to meet the ongoing liabilities of the company. (para 9)

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- (3) The exercise of the directors' right of inspection was not extortion or oppression, nor was an intention to remove any person from the management of a company *per se* an improper purpose. Given the wide compass of a director's right of inspection, and as s. 167(6) was an adjunct to this right, it did not follow that simply because there was a possibility that future litigation may ensue from an inspection in furtherance of the ongoing hostility between the directors and shareholders of the company, that Mirza should be precluded from exercising his rights of inspection as a director. The verification of the extent of the large debt owed by the company to Carat was not to the detriment of the company but was for the benefit of the company. (para 11)

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- (4) While Carat's documents relating to the debt had been furnished to Mirza's solicitors, the company's records in relation to the same were insufficient. In any event, Mirza was not obliged under the law to justify his request to inspect the accounts of the company. Further, Mirza had complied with the requirements of s. 167(6) of the Companies Act 1965 by providing a letter of undertaking from the proposed auditor to the effect that the information acquired would not be disclosed by him to third parties. (paras 13 & 15)

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- A Case(s) referred to:**
Tan Kim Hor & Ors v. Tan Chong Consolidated Sdn Bhd [2008] 1 LNS 741
CA (refd)
Welch & Anor v. Britannia Industries Pte Ltd [1993] 1 SLR 673 (*refd*)
Wuu Khek Chiang George v. ECRC Land Pte Ltd [1999] 3 SLR 65 (*refd*)
- B Legislation referred to:**
Companies Act 1965, s. 167(3), (6)

For the plaintiff - Renu Zechariah; M/s Rosley Zechariah
For the defendant - Kabir Dhillan; M/s Raja Riza & Assoc
- C Reported by** *Suhainah Wahiduddin*

JUDGMENT

D Nallini Pathmanathan JC:

Decision

- E [1]** The plaintiff ('Mirza') is a director and a 35% shareholder of the defendant ('the company'). By this originating summons, Mirza applies to inspect the accounts of the company under s. 167(6) of the Companies Act 1965. He was until recently the managing director of the company. The precise prayers sought in Mirza's application are that the 'accounting and other records' of the company be made available for inspection and examination. It is proposed that an approved auditor inspect and analyse the accounts of the company. Such findings are then to be made available to the company. The company strenuously opposes this application
- F**
- G [2]** In his affidavit in support of the application Mirza explains that the purpose of the application is that he wishes to ascertain the veracity and quantum of the debt owed by the company to Carat Media Services Sdn. Bhd. ('Carat'). The majority of the Board of the company however have approved the repayment of this debt disputed by Mirza to Carat. Mirza explains that there are several transactions which he seeks to understand in its proper perspective
- H** in his capacity as a director. He maintains that he has had difficulty obtaining access to the accounts. There is an ongoing dispute between Mirza and the other directors and shareholders of the company and as a consequence a series of suits, no less than seven suits have been filed in different Kuala Lumpur High Courts. It is
- I** evident that there is a considerable degree of hostility between Mirza and the other directors and shareholders of the company.

[3] In further support of his application Mirza has included an undertaking from the proposed auditor to the effect that he will maintain the confidentiality of the records he examines and the report he ultimately produces. Mirza also undertakes to bear the costs of the auditor.

[4] The company disputes this application on the grounds that:

- (i) Documents have in fact been made available to Mirza. Therefore there is no basis for this repeated request;
- (ii) Mirza has acted in breach of his fiduciary duty as a director in that it is alleged that two cheques to Carat that were meant for the payment of a prior debt were utilized or authorized by Mirza to be used by Carat for 'booking' purposes, in other words for a future obligation rather than for a previously incurred debt;
- (iii) An injunction sought in the course of these proceedings had been refused, *inter alia* on the grounds that there was no evidence that the debt owed by the company to Carat was unlawful. Accordingly it is contended that the request for documents here is superfluous;
- (iv) If this order is granted, Mirza will utilize the information thus procured to commence further proceedings, which it is contended will be to the detriment of the company.

The Law

[4] The accounting and other records of a company of operations within Malaysia must be open to inspection by the directors at all times under s. 167(3) of the Companies Act 1965 ('CA'). The learned authors of *Malaysian Company Law Principles & Practice* by Chan & Koh (2nd edn) states as follows in relation to this section:

... The provisions in s. 167(3) and (4) operate as a declaration of the common law right of a company's director to personally inspect and take copies of accounts belonging to the company, because the right is essential to the director for the proper performance of his duties as a director. In the celebrated case of *Edman v. Ross* [1922] 22 SR (NSW) 351, 361 Street CJ made this remark:

The right to inspect documents and if necessary to take copies of them is essential to the proper performance of a director's duties, and though I am not prepared to say that the court might not restrain him in the exercise of this right if satisfied affirmatively that his intention was to abuse the confidence reposed in him and materially to injure the company, it is true

A nevertheless, that its exercise is, generally speaking, not a matter of discretion with the court and that he cannot be called upon to furnish his reasons before being allowed to exercise it.

B [5] A director is therefore entitled to inspect the accounts of the company in which he holds such position, save where there is affirmative evidence that his intention is to cause detriment to the company. This statement of the law was also so stated in the Singapore case of *Wuu Khek Chiang George v. ECRC Land Pte. Ltd.* [1999] 3 SLR 65, 78:

C ... The right of a director to inspect the books and records of the company flows from his office as a director and enables him to perform his duties as a director, including the duty to ensure that the company complies with the requirements as to accounts set out in the Companies Act ... Such right is an important one, as the books and records of a company are a primary and sometimes the only source of information as to the state of affairs of a company. It follows that unless a director has access to these sources of information, he would be severely inhibited in the proper performance of his duties. So long, therefore, as such right is exercised for that purpose and not with a view to causing detriment to the company, the right to inspect is “absolute”. In this sense and to that extent, the right may be termed “absolute”. The corollary of this is that the right will be lost where it is exercised not to advance the interests of the company but for some ulterior purpose or to injure the company.

F [6] The position in law in Malaysia is identical and the position above has recently been re-affirmed by the Court of Appeal in *Tan Kim Hor & Ors v. Tan Chong Consolidated Sdn Bhd* [2008] 1 LNS 741 (Appeal W-02-735-2001) where, *inter alia*, the court held:

G (i) ... It is settled law that the defendant having resisted the plaintiffs’ right to inspect the accounting and other records of the defendant, bears the burden of proving that the plaintiffs’ right is being or will be exercised for an improper purpose: *Australian Metropolitan Life Assurance Co Ltd v. Lire & Ors* [1923] 33 CLR 199, per Isaacs J; and *Wuu Khek Chiang George v. ECRC Land Pte Ltd.* [1999] 3 SLR 65, CA per LP Thean JA.

H It is for the defendant to show ‘clear proof and to satisfy the court ‘affirmatively’ that the grant of the right of inspection would be for a purpose detrimental to the interests of the company. There must be a ‘real ground’ that the right would be abused and that substantial harm would be caused to the company thereby: *Wuu Khek Chiang George, supra*.

I There is no burden on the plaintiffs as directors to show any particular reason for their request for inspection. This will ordinarily be assumed *Molomby v. Whitehead & Australian Broadcasting Corp* [1985] 63 ALR 282, and *Wuu Khek Chiang George* ...

And further on in the judgment:

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... The right of a director of a company to inspect its accounting and other records is a right existing at common law and is recognized in s. 199 of the Companies Act. Such right is a concomitant of the fiduciary duties of good faith, care, skill and diligence which the director owes to the company, and as such, like other rights and powers, must be exercised for the benefit of the company. The obligation of the company to allow inspection by its director is mandatory.

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This right has been described as being “absolute”. A director is *prima facie* entitled to inspection and is not required to demonstrate any particular ground or ‘need to know’ as a basis: *Molomby, supra*. So long as the right is exercised for the proper performance of the director’s duties to the company and not with a view to causing any detriment to the company, it is in that sense ‘absolute’ ...

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And towards the end of the judgment:

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... in our view, section 167(6) is intended to facilitate and liberalise, and is not meant to impede the right of inspection. Indeed, almost unbridled powers are conferred upon the Court to give effect to the directors’ right of inspection ...

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[7] Given the foregoing it is evident that Mirza as a director is entitled to inspect the accounting and other records of the company and concomitant with that, under s. 167(6) should be allowed to appoint an independent auditor to analyse the accounts on his behalf on condition that confidentiality of the records of the company is preserved. Mirza would of course lose that right if it could be shown that he is seeking this order to cause detriment to the company or is acting in breach of his fiduciary duties.

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Analysis Of The Differing Contentions Of Mirza And The Company

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[8] The company as outlined above maintains that Mirza is in breach of his fiduciary duty and is seeking to injure or cause detriment to the company. Each of these contentions has therefore to be considered in turn.

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Did Mirza Act In Breach Of His Fiduciary Duties?

[9] The company relies on the alleged fact that two cheques prepared by persons other than Mirza and signed by signatories other than Mirza were originally meant to be issued to Carat towards reduction of a prior debt owed to Carat. However it is contended that Mirza who was the managing director at the time,

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- A altered the purpose of the payment such that it was to be utilized by Carat towards the payment of a 'booking fee' on behalf of the company rather than payment of the debt owed by the company to Carat. Mirza in response denies that this amounts to a breach of his fiduciary duty. An objective analysis of the foregoing does not
- B show that Mirza acted in breach of his fiduciary duties. He in no manner profited from these payments. The payments were made to the same original payee, Carat. The monies were used to meet the ongoing liabilities of the company. In any event the cheques were not prepared nor signed by Mirza. Where then is the breach of
- C fiduciary duty?

Is There Evidence That Mirza Seeks To Act To The Detriment Of The Company?

- D [10] In this context, it is contended that if Mirza is allowed access to the accounting and other records of the company, this may well result in further litigation being filed by Mirza which will cause detriment to the company. Mirza contends in reply that the purpose of seeking this order is to verify the authenticity and veracity of the debt owed by the company to Carat and that such a purpose
- E cannot be to the detriment of the company, but instead serves to benefit the company.

[11] When these competing contentions are considered it is evident that:

- F (i) The real hostility is between Mirza and the other directors and shareholders of the company, not between Mirza and the company *per se*. The fact that further litigation may ensue means that there is a possibility that there will be further litigation between Mirza and the other directors and shareholders of the company. In *Welch & Anor v. Britannia Industries Pte Ltd* [1993] 1 SLR 673 it was held *inter alia*, that
- G an intention to wrest control of the company from other shareholders cannot be regarded as synonymous with an intention to injure the company. Even if this extends to an intention to force control of the company to one party, that
- H intention will not deprive that same party of the right of inspection. The exercise of the directors' right of inspection is not extortion or oppression, nor is an intention to remove any person from the management of a company *per se* an improper purpose. Given the wide compass of a director's right of
- I inspection, and as s. 167(6) is an adjunct to this right, it does not follow that simply because there is a possibility that future litigation may ensue from an inspection in furtherance of the

ongoing hostility between the directors and shareholders of the company, that Mirza should be precluded from exercising his rights of inspection as a director. A

- (ii) The verification of the extent of the large debt owed by the company to Carat is not to the detriment of the company but is for the benefit of the company. B

[12] The company also contended that:

- (a) Mirza had already been furnished with documents relating to the debt; and C
- (b) His request is premature as he has not written to the directors seeking permission to inspect the accounting and other records of the company.

[13] With respect to (a), I accept that while Carat's documents relating to the debt have been furnished to Mirza's solicitors, the company's records in relation to the same are insufficient. In any event, Mirza is not obliged under the law to justify his request to inspect the accounts of the company. D

[14] As for (b) this was settled when I asked during the course of the hearing whether the company was prepared to allow Mirza access to the accounting and other records of the company. There was no clear affirmative answer in response. E

[15] I am satisfied that Mirza has complied with the requirements of s. 167(6) of the Companies Act 1965 by providing a letter of undertaking from the proposed auditor to the effect that the information acquired shall not be disclosed by him to third parties. F

[16] Accordingly, Mirza is granted an OIT of prayers (i) and (ii) of encl. 1. G

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